

Testimony By Carl Malamud

Mr. Chairman, Representative Millender-McDonald, Distinguished Members of the Committee,

Thank you for your kind invitation to appear before you today.

On March 9, Smithsonian Business Ventures announced a joint venture with Showtime to create "Smithsonian on Demand." The announcement has sparked a firestorm of controversy and concern. The debate has been so fierce that the Washington Post has devoted 10 news articles, an editorial, and a comic to the subject. The most popular blog, BoingBoing.Net, has featured numerous posts on the subject. Letters of protest have been sent to Secretary Small from hundreds of distinguished filmmakers, historians, archivists, media professionals, librarians, and concerned citizens.

The reaction of the Smithsonian Institution to this outpouring of concern has been to insist the public is misinformed. Secretary Small, in an April 28 letter to the Chairs of the Smithsonian Advisory Boards, says "what the press fails to appreciate is the new approach will further the Smithsonian's mission and reach millions of people beyond our walls." In an April 5, 2006 press release, the Institution's Office of Public Affairs cited "erroneous claims" that "need to be clarified."

The public and the press are not "misinformed," but they are being poorly informed by the Smithsonian Institution. But, that is only part of the problem at the Smithsonian. Smithsonian Business Ventures has failed to consult enough with the distinguished curators, archivists, webmasters, scientists, and others who make up the professional staff of the Smithsonian Institution. Smithsonian Business Ventures has also failed to consult with the public. The result has been a series of bad business decisions, decisions that are contrary to the mission of the Institution to further the "increase and diffusion of knowledge among men." (20 USC 3).

I will not dwell in this testimony on the continuing accounting problems within Smithsonian Business Ventures. The Washington Post reported on April 19, 2006 that after numerous complaints by individual museums that they weren't receiving their fair share of store profits, the accounting problem has reached the level of an audit by the Office of the Inspector General, an audit that is also examining executive salaries and bonuses.

Excess salaries and accounting issues are signs of trouble in any business or institution. In the case of the Smithsonian Institution, there are also

other signs. There has been a pattern of bad contracts and a culture of secrecy.

The Showtime Contract

I would like to begin by discussing the contract with Showtime. The contract has not been released because it is "proprietary." We know that if a filmmaker wishes to make a film that has "non-incidental" access to the archives or the staff, a treatment (script) must be submitted to the new joint venture for a right of first refusal. It is unclear who makes the decision on what "incidental" or "non-incidental" is and it appears that there are no firm criteria for such a determination.

The Smithsonian has called this right of first refusal an opportunity for young filmmakers. An unspecified investment will be made in commissioning new films, the Smithsonian will receive an unspecified flat fee, and might perhaps receive a share of profits. The Smithsonian has an unspecified equity stake in the new venture, the bylaws, articles, and composition of the board of directors of which are still unclear.

This deal is supposed to be good for the genre, but even if it were, communication has been lacking as those who practice the genre of documentary filmmaking appear universally outraged.

No matter how you spin it, this contract is anti-competitive. If a filmmaker gets a grant from the National Endowment for the Humanities or the National Endowment for the Arts, one of the clauses in those grant prohibit commercial distribution. These clauses are not unusual in foundation grants and other sources of funding. This is a catch-22 for young filmmakers: if their film uses resources from the Smithsonian, many of the usual funding vehicles would not be compatible with the new access policies.

The Secretary has said that this issue is really only about commercial filmmakers, such as Ken Burns. Does the Smithsonian owe Mr. Burns a living? Of course not. But, every network has a different style of programming. Perhaps Mr. Burns prefers PBS? Is it the place of an instrumentality of the United States to require Mr. Burns to spurn PBS and make his films with Showtime?

One can imagine the difficulty of such a clause not only for filmmakers but for Smithsonian staff. Many of the events put together at the Smithsonian are blockbusters that could easily excite interest from a large number of filmmakers. Will an event curator be precluded from trying to find multiple partners interested in creating films for a single event?

These facts are troubling, but two more facts are even more troubling:

- The contract appears to have a term of 30 years. In this Internet era, even 3-year distribution contracts can be considered long.

- The Smithsonian Institution considers audio and video on public web sites run by the Institution to "compete" with the contract and are reportedly ordering webmasters to strip all public websites of significant amounts of content.

The fact that the contract has a term of 30 years was only recently disclosed, and only after intense questioning by the press. A 30-year contract is an awfully long time to be locking up resources that belong to the American people.

To see what a contract like this means, think back 30 years to 1976. In 1976, the Internet had less than 200 computers. Ted Turner had just begun his experiment of beaming WTBS programming up to a satellite and offering his programming on cable television. C-SPAN was a gleam in Brian Lamb's eye and he wouldn't get his new station running until 3 years later. The fax machine was just becoming popular in Japan and many people thought this device might just catch on in the United States and become the medium of choice for the delivery of content.

If the Smithsonian Institution had signed a 30-year contract in 1976, it is unlikely that the contract would have taken into account the rapidly changing world of media. Bluntly put, it is likely that a 30-year contract signed in 1976 would have been a bad contract.

It doesn't take an oracle to see that the 30-year contract signed in 2006 might be equally bad. The contract is for cable-on-demand and none of the announcements mention the Internet as a distribution vehicle. Cable-on-demand is an interesting service, but in today's world of dramatically decreasing costs for producing videos and an in-progress revolution in distribution channels, does such a contract make any business sense?

Even more troubling than the 30-year term is the non-compete provision. The Institution has stressed that this contract will not impede access. But, such statements are disingenuous since public access is being limited already as a direct result of the contract.

Shortly after the contract was signed, Smithsonian webmasters were told to take down Smithsonian.TV, a beautiful site that once provided a portal to rich media resources throughout the Smithsonian. The reason staff were given for this take down notice from the Castle? The site apparently violated the non-compete provisions of the Showtime contract.

Smithsonian webmasters are reportedly being advised that they will be placed under strict guidelines on how much audio and video they will be permitted to place on any site, a guideline that may very well lead to taking a huge amount of content off of the Smithsonian's public web sites.

Repairing the Institution

There are a series of steps that can be taken to reinstitute the public trust in the Institution. None of these steps are radical, but taken together they help make the public, the primary stakeholders in the Institution, an integral part of the process. The result will be better information flowing to decision-makers at the Smithsonian, better decisions, and buy-in by the general public. These steps include:

1. A staff investigation into the legality of the Showtime and other contracts.
2. Changing the definition of "agency" to include the Smithsonian Institution.
3. Public hearings on the implications of different business models for the financial health and overall mission of the Institution.
4. A modest infusion of new funding directed towards making resources available on the Internet for the public to freely use.

A Staff Investigation

The Showtime contract is only one of several troubling ventures the Smithsonian has embarked upon in the last few years. A previous contract with Harper Collins was so troublesome that the prestigious Society of American Historians has de-listed Smithsonian Books as a publisher-member because of a failure to adhere to "the society's objectives of promoting good historical writing." Sixteen other publishers maintain these high standards and remain members.

The Showtime contract has clearly had a dramatic effect on access. Content is being stripped from public web sites. Filmmakers have onerous new provisions to meet before they are granted access. Even internal filmmakers who work at the Smithsonian have had their work limited.

Are contracts such as these appropriate for a public trust? No open and fair procurement process was conducted. The term of the contracts seems unreasonably long. The financial terms have not been disclosed. The non-compete provisions are troubling. Contract provisions prohibit disclosure of the terms. And, the criteria for determining who falls under the "non-incidental" criteria are vague and arbitrary.

It would not be inappropriate for a Committee of the House of Representatives to conduct a staff investigation into all such contracts, investigating if they are compatible with the charter of the Institution. If such contracts are not compatible, they may be terminated for the convenience of the government. Such a staff investigation could also be used to shed light on other operational issues, such as what appear to be excessively high rates of executive compensation and procurement policies that do not appear to meet the high standards expected of government.

Clarifying the Definition of Agency

A second step that might be considered is to clearly specify that certain Acts of Congress apply to the Institution:

1. The Freedom of Information Act (5 U.S.C. 552) specifies a set of procedures by which information will be provided to the public. Although the Smithsonian Institution declares that it subscribes to the "intent and spirit of the act" (Smithsonian Directive 600), my own recent experience filing a FOIA request with the Institution demonstrates that this adherence is symbolic at best. The Institution has, as of this date, failed to meet the procedural requirements of FOIA. Because judicial opinions have declared that the Institution is not an agency for purposes of the FOIA (Dong v. Smithsonian, 125 F.3d 877), explicit legislative action would be required.

2. Explicitly defining the term

"agency" to include the Smithsonian Institution would also be appropriate in reference to the Privacy Act of 1974 (5 USC 522a).

3. One of the more frustrating aspects of the

operation of the Smithsonian Institution from the point of view of concerned members of the public is the closed nature of deliberations. For example, while the Regents are responsible for approving Smithsonian Institution actions, the minutes of those meetings are not available to the public. Extending the definition of agency as specified in the Government in the Sunshine Act (5 USC 552b) would provide significantly more transparency of operations.

4. Because financial matters are at the heart

of the recent controversies, extension of the Financial Management Improvement Act of 1996 and the Chief Financial Officers (CFO) Act of 1990 to include the Smithsonian as a "CFO Act Agency" would provide a guarantee that the Institute will be able to "generate reliable, useful, and timely information with which to make fully informed decisions and to ensure accountability on an on-going basis" (GAO-05-20).

Public Hearings

The third step that could be undertaken are a set of hearings on the proper balance of the public interest and the revenue generating needs of the Institution. Many members of the public believe firmly that one reason the Smithsonian has made a series of bad business decisions is because the staff has made these decisions without public input. Public input is not a nuisance, it is the way we learn what alternatives are available.

In an April 27, 2006 letter to the Secretary, the Chairman and Ranking Member of the Subcommittee of the Interior of the Committee on Appropriations stated "The Committee believes that the Regents should charge the Secretary with organizing a formal public process, including an opportunity for public testimony." However, in the May 9 response from the Regents, Roger W. Sant, Chairman of the Executive Committee, stated:

"Both your letter of April 27 and your statutory language of May 4 refer to a public process for discussion of proposals that would affect the public's access to Smithsonian resources. The Institution fully recognizes its obligation to work with Congress and in particular its committees of jurisdiction to keep them informed of our opportunities and challenges."

This answer recognized the need to work with Congress, but appears to dismiss the suggestion of involving the public. But, a public trust cannot function without the public. If the Smithsonian Institution is reluctant to hold hearings, the Congress might wish to consider alternatives, such as holding the hearings in Congress, or creating a blue-ribbon commission to report back to the Congress and the Board of Regents after taking public testimony and conducting an investigation of the current operations of the Smithsonian and alternative business models available.

Funding of the Institution

The fourth step is to recognize that the root of the issue at hand is inadequate funding for the largest museum complex in the world. Simply put, there is not enough money and the Institution does not receive adequate support.

Given the recent actions of the Smithsonian Institution and the very real financial pressures on all of the government, simply increasing the budget may appear to fly in the face of financial realities. However, a directed infusion of funds with the specific purpose of placing more of the archives on the Internet for the public to use without restriction would have a dramatic impact on staff morale and on the perception and visibility of the Institution by the general public. Putting more information on-line will make the Institution more visible and that, in turn, will help the Institution raise funds.

For the Benefit of Mankind

In conclusion, I would like to call the Committee's attention to the words of Secretary Joseph Henry. In his first annual report in 1847, as the first Secretary of the Institution, after concluding a lengthy public process in which the American people and the Congress had formally decided to accept the initial bequest, Mr. Henry said:

"The bequest is for the benefit of mankind. The Government of the United States is merely a trustee."

Over the years, the bequest of James Smithson has been joined by many other contributions by the federal government and by a multitude of generous deeds of gift by citizens. These contributions to the collections were made with the intent that the archives would be available, without unreasonable restrictions, to the American people.

There are another set of contributions we should not forget, the contributions of the staff of the Smithsonian Institution. These staff take care of 24 million visitors every year, maintain numerous web sites, not to mention running 19 museums and galleries, a zoo, and numerous research facilities.

Over the last few years, the "intent and spirit" of those contributions-by Joseph Henry, by James Smithson, by a multitude of other benefactors, and by the staff who have dedicated, in many cases, decades of public service-has not been properly recognized.

One can only imagine what Joseph Henry or James Smithson would think of the contract with Showtime to restrict access to the collections, but it does not take a leap of imagination to conclude they would not be happy.

Once again, I would like to thank the distinguished members of the committee for the invitation to appear before you today and I would be happy answer any questions you may have.